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No. 106

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

COMPCO CORPORATION,

Petitioner,

vs.

DAY-BRITE LIGHTING, INC.,

Respondent.

REPLY BRIEF FOR PETITIONER.

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This reply brief is prompted by the *amicus curiae* brief filed by the Solicitor General of the United States.

Passing Off.

The *amicus curiae* brief suggests that this case should be remanded to determine whether Compco's product is properly labelled. The Solicitor General quite rightly appreciates that the only requirement in making the product formerly patented by another is to label properly so as to preclude "passing off". In this case, remand is unnecessary, as can be appreciated from the prominent labelling employed by Compco. The carton is clearly identified by the Mitchell "logo" (Def. Ex. EE, R. 210, 238). The same characteristic printing is used on the fixture itself (R. 209-210; Def. Ex. OO, R. 207, 238).



Carton



Fixture Labels.

The clear marking was recognized by the respondent Stiffel in the companion case (No. 108). At page 8 of the Stiffel brief in opposition to the petition for a writ of *certiorari*, we read in Footnote 6:

> "In the *Day-Brite* case, unlike the instant case, defendant 'clearly marked' its products as its own."

Further, the Court of Appeals for the Seventh Circuit specifically noted that petitioner's product was "always shipped in clearly marked containers", having before it defendant's carton, Exhibit EE. *Day-Brite Lighting, Inc. v. Compco Corporation*, 311 F. 2d 26, 29 (1962).

Secondary Meaning.

The *amicus curiae* brief succinctly sets forth the evidence in Case No. 106 in Footnote 15 at pages 34 and 35, stating that:

"(no) prospective purchaser had in fact been deceived",

and that:

"no identifying 'secondary meaning' is legally cognizable in such an article".

The matter of secondary meaning was squarely presented to the District Court in a motion for an order clarifying Finding of Fact 24. On March 7, 1962, the late Judge Miner denied Day-Brite's motion which would have Finding of Fact 24 read:

"The appearance of plaintiff's CFI-10 reflector is so unique and distinctive and has become so closely associated with plaintiff by purchasers that it has acquired a secondary meaning identifying plaintiff to the trade."[1]

Purchaser Confusion.

The statement in the *amicus curiae* brief quoted above on the lack of deception of any prospective purchaser of the fluorescent light fixtures highlights the test to be employed in unfair competition cases—that of purchaser confusion. In this case, there was no testimony from or about purchasers. What Day-Brite did base its case on was the mistake of a workman viewing fixtures installed in a twenty-two foot high ceiling (R. 71). Contending that the test should be confusion of any casual viewer goes far beyond the requirement in the *Kellogg* case:

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[1] Finding of Fact 24 currently in the case and which was sought to be clarified, reads:

"The appearance of plaintiff's CFI-10 reflector design has the capacity to identify plaintiff to the trade and does in fact so identify plaintiff to the trade."

The Solicitor General states that this Finding is legally objectionable (page 34, f.n. 15).

". . . not to insure that every purchaser will know it to be the maker, but use every reasonable means to prevent confusion." *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 121 (1938).

The *Kellogg* doctrine is followed in contemporary decisions on unfair competition, a representative holding being of the Ninth Circuit in 1963. *Intricate Metal Products, Inc.* v. *Schneider*, ... F. 2d ....., 139 U.S.P.Q. 231, 235:

> "The only evidence of confusion to which we are referred is testimony of furniture manufacturers to the effect that upon being invited to examine the accused sofa mechanism, they could not tell it from Signal's, and thought that it was Signal's. There is no testimony that anyone ever *bought* the accused mechanism mistaking it for Signal's. An inference of such a result would follow from similarity of appearance, while perhaps appropriately applied in the case of a housewife in a supermarket, is completely inappropriate in a case of such knowledgeable customers as furniture manufacturers. The workmen might well be confused, but hardly the purchaser." (Emphasis supplied)

Respectfully submitted,

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